UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD FOURTH REGION

BEACON SALES ACQUISITION, INC. d/b/a QUALITY ROOFING SUPPLY COMPANY

COMITAINI		
	Cases	4-CA-36952
		4-CA-37107
		4-CA-37120
		4-CA-37209
and		4-CA-37377
		4-CA-37304
		4-CA-37378
		4-CA-37433
		4-CA-37306
		4-CA-37438
INTERNATIONAL UNION OF		4-CA-37456
OPERATING ENGINEERS LOCAL	542,	4-CA-37548
AFL-CIO.		4-CA-37577
		4-CA-37884
		4-CA-37885

CHARGING PARTY, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542'S, RESPONSE TO RESPONDENT'S PETITION TO REVOKE TRIAL SUBPOENA

The Charging Party, International Union of Operating Engineers, Local 542, files the herein memo in opposition to the Respondent's Petition to Revoke the Trial Subpoena compelling Robert Buck to appear and give testimony at trial.

I. INTRODUCTION

On April 29, 2011, the charging party mailed to Robert Buck, the former CEO and Chairman of the Board of Directors for the Respondent, at his home, a

subpoena via regular mail and certified mail, return receipt requested. The certified letter contained the original subpoena as well as a witness fee to compel Mr. Buck's attendance at the trial on May 13, 2011. The regular mail had a photocopy of the subpoena and no witness fee. On May 9, 2011, The certified letter was returned, refused, to the Union office.

The Union seeks Mr. Buck's testimony due to the continuing averments by the Employer's bargaining team that there was a corporate policy that the decision to not sign the collective bargaining agreement when the parties were \$1700.00 per month apart, was the Board of Directors (January 11, 2011); wages were given to all employees equally and it was the decision of the corporate board and the decision to pay everyone equally (January 11, 2011); November 15, 2010, the bargaining team stated that they cannot bargain health care separately because everything had to be decided by the corporate board of directors. On December either 18th or 19th, 2007, the corporate board decided to hold back the bonuses of the employees who voted for the Union. On April 8, 2008, the Employer's lead negotiator said that the corporate board only granted 2% increases. On May 8, 2008, the Employer's lead negotiator said that the corporate board decided that they would not give anything different to the employees that voted for the Union than the non-union employees. On May 4, 2009 the lead negotiator stated that all pay rates have to conform with corporate policy. On July 7, 2009 the Employer stated it would not change its position on wages because of a corporate policy and they would not move. This was referring to that Union employees could not receive more than non-union employees could.

The charging party now seeks to question the Chief Executive Officer and Chairman of the Board of Directors on these alleged corporate policies. The Union seeks to know whether these policies exist, what they are, and what the discussions were regarding these corporate policies, The Charging Party seeks to prove that whether this is a written policy and all facets of this corporate policy that the Employer's negotiating team reiterated on numerous occasions.

Robert Buck is hardly a distant corporate director in this matter. He personally met with and spoke to the employee before each union election in an effort to persuade them to reject unionization. He personally ratified the decision to not pay bonuses to those employees that voted for the union. He was intimately involved both in the election procedure and the formulation of the Employer's bargaining positions

With regards to the allegation that the witness was not served properly, the Union relies on the affidavit of Louis Agre as well as the exhibit showing the certified mail refused.

II. ARGUMENT

The Eastern District of Pennsylvania and Third Circuit has held:

Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Federal Rule of Evidence 402 provides that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. R. Evid. 402. The Third Circuit has noted, "Rule 401 does not raise a high standard." Hurley v. Atl. City Police Dep't, 174 F.3d 95, 109-10 (3d Cir. 1999) (citing In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 782-83 (3d Cir. 1994)). The Third Circuit has stated:

As noted in the Advisory Committee's Note to Rule 401, "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Because the rule makes evidence relevant "if it has any tendency to prove a consequential fact, it follows that evidence is irrelevant only when it has no tendency to prove the fact."

Blancha v. Raymark Indus., 972 F.2d 507, 514 (3d Cir. 1992) (quoting 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5166, at 74 n.47 (1978)). Waters v. Genesis Health Ventures, Inc., 400 F. Supp. 2d 808, 811 (E.D. Pa. 2005)

Further relevant evidence also includes the evidence that makes it more or less likely that another witness is testifying credibly. Waters v. Genesis Health Ventures, Inc., (supra)

Finally with regards to the relevancy issue, it is immaterial whether another person can testify to the facts. If the Respondent wishes to call only one witness for these facts that is the Respondent's choice. The Charging Party can present its case through any witness it believes will further its case. Accordingly Robert Buck

should testify.

With regard to the issue whether the subpoena was served with the witness

fee the Charging Party avers that it properly served the subpoena pursuant to the

Board's rules by mailing a copy to the witness, via certified mail, to his home. (see

Exhibits "A" and "B".

Respectfully submitted,

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Louis Agre
1375 Virginia Drive
Fort Washington, PA 19034
(215) 542 7500

Counsel for the Charging Party

Dated: May 9, 2011

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CERTIFICATE OF SERVICE

I, Louis Agre, served a true and correct copy of Charging Party, International Union of Operating Engineers, Local 542's, Response to Respondent's Petition to Revoke Trial Subpoena was served upon:

Peter Chatilovicz PChatilovicz@seyfarth.com

and

Jennifer Spector@nlrb.gov

VIA Electronic mail

finis age

Louis Agre 1375 Virginia Drive Fort Washington, PA 19034 (215) 542 7500 Counsel for the Charging Party

May 9, 2011

EXHIBIT A

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD FOURTH REGION

BEACON SALES ACQUISITION, INC. d/b/a QUALITY ROOFING SUPPLY COMPANY

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		4-CA-37884
		4-CA-37885
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AFFIDAVIT OF LOUIS AGRE

My name is Louis Agre and I make this affidavit accordingly.

- 1. I am an employee, organizer and In-House Counsel for the International Union of Operating Engineers Local 542.
- 2. I am representing the charging party in the above referenced cases.
- 3. On April 29, 2011, I directed my secretary, Mary Taylor, to make out a certified mailing envelope, return receipt requested, to Robert Buck at 7614 Swinks Court, McLean, VA 22102.
- 4. I also directed her to prepare a regular mail envelope to Robert Buck at 7614 Swinks Court, McLean, VA 22102.

- 5. On April 29, 2011I placed the original subpoena and the witness fee inside the certified mail, return receipt requested envelope. I also sent a regular mail envelope with a copy of the subpoena without the check or original subpoena.
- 6. On April 29, 2011I personally delivered to the United States Post Office, in Fort Washington, PA, both the certified letter and the regular mail letter and handed them to the postal clerk.
- 7. The certified letter had the original subpoena and the witness fee enclosed in it. The regular mail letter just had a copy of the subpoena.
- 8. On May 9, 2011, the Certified letter was returned refused. (See attached Exhibit)

I solemnly swear the penalty of perjury that the forgoing is true to the best of my knowledge recollection, information and belief.

Respectfully submitted,

Juis age

Louis Agre 1375 Virginia Drive Fort Washington, PA 19034 (215) 542 7500 Counsel for the Charging Party

DATED: May 5, 2011

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EXHIBIT B



INTERNATIONAL UNION
OF
OPERATING ENGINEERS
LOCALS 542, 542-A, 542-B, 542-C, 542-D
1375 VIRGINA DRIVE
FORT WASHINGTON, PA 19034



7003 1680 0004 4608 5794



REC'D MAY 9

RETURN RECEIPT REQUESTED Mr. Robert Buck 7614 Swinks Court McLean, VA 22102 REFUSED

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